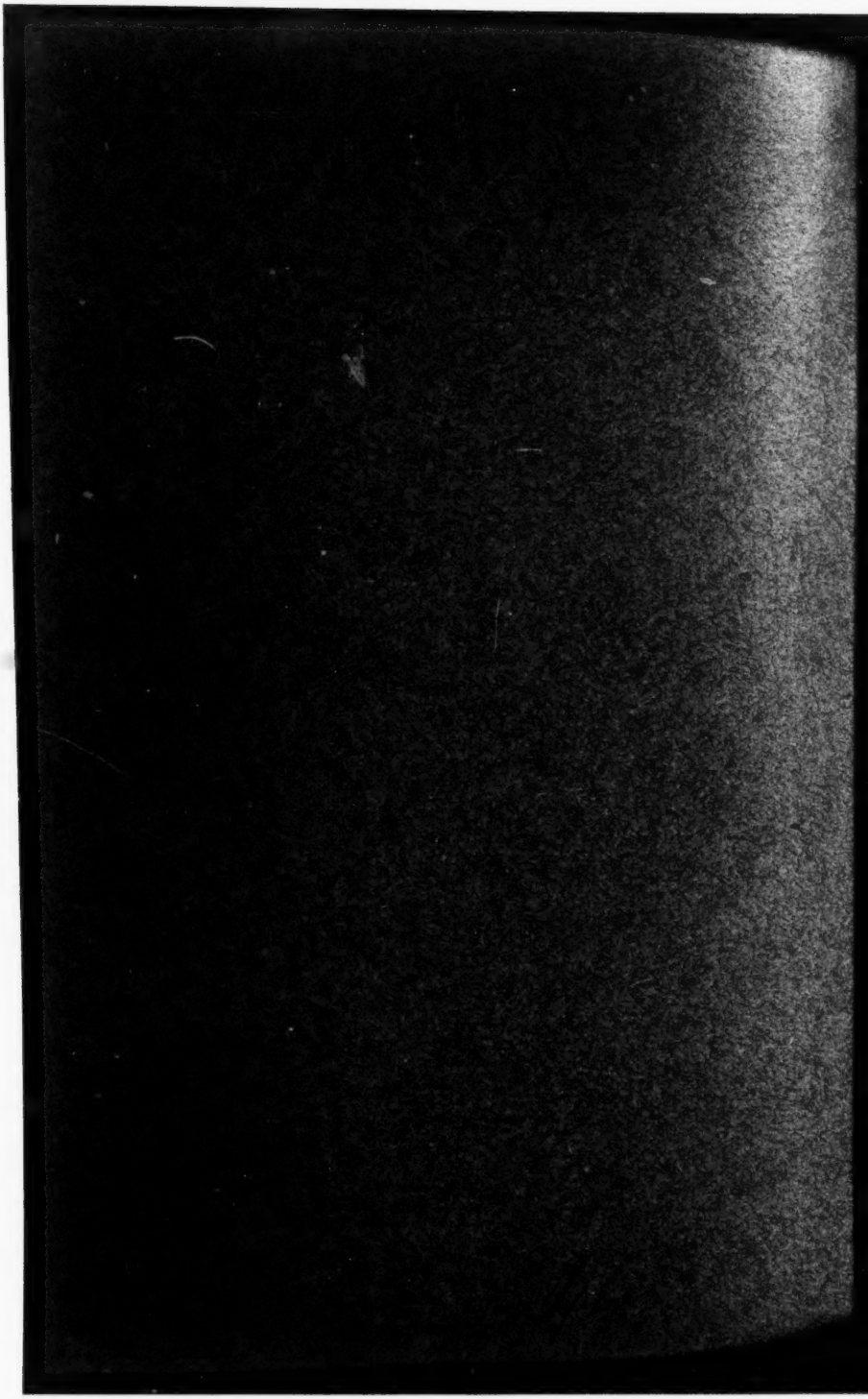

In the Supreme Court of the United States

OCTOBER, 1916, TERM.

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, an Hawaiian Corporation, *Plaintiff in Error.* *vs.* GEORGE E. WARD, *Defendant in Error.*	Error to the Circuit Court of Appeals, Ninth Circuit.

BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS

Statement of the Case:

This case comes to this Court by writ of error to the Circuit Court of Appeals for the Ninth Circuit, pursuant to the provisions of the Judicial code of the United States, and particularly § 241 thereof.

The action was originally instituted March 10, 1913, in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, the defendant in error filing a complaint alleging personal injuries sustained by him through the negligence of the plaintiff in error. On the first trial a motion for a non-suit was made by plaintiff in error and granted and the case was thereupon taken on error to the Supreme Court of the Territory of Hawaii, resulting in a reversal of the judgment of non-suit and the ordering of a new trial.

The second trial resulted in a verdict by the jury awarding the defendant in error $13,000 damages, and the judg-

ment entered on the verdict was carried to the Supreme Court of Hawaii on writ of error, resulting in an affirmance by that court on March 24, 1915. The plaintiff in error thereupon carried the case by writ of error to the Circuit Court of Appeals for the Ninth Circuit, pursuant to the provisions of § 246 of the Judicial Code, as amended by the Act of Congress of January 28, 1915.

On May 15, 1916, the Circuit Court of Appeals affirmed the judgment of the Supreme Court of Hawaii and the case is now brought to this Court by writ of error, as above stated.

The defendant in error has filed herein a motion to dismiss the writ of error on the ground that this Court has no jurisdiction to hear or determine this cause or to review the said judgment of the Circuit Court of Appeals, claiming, first that § 246 of the Judicial Code, as amended by the Act of January 28, 1915, made the judgment of the Circuit Court of Appeals final; and second, that error does not lie from the Supreme Court of the United States to the Circuit Court of Appeals in cases of the character of the one at bar.

ARGUMENT.

UNDER SECTION 241 OF THE JUDICIAL CODE, A WRIT OF ERROR LIES FROM THE SUPREME COURT TO THE CIRCUIT COURT OF APPEALS TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS ON A CASE BROUGHT THERE UNDER THE PROVISIONS OF SECTION 246 OF THE JUDICIAL CODE, AS AMENDED JANUARY 28, 1915.

The Organic Act of the Territory of Hawaii, as originally enacted, made no provision for a review of the final

judgments of the courts of the Territory of Hawaii, except in the same manner and in the same class of cases that the judgments of state courts are reviewable (§ 86 of "An Act to Provide a Government for the Territory of Hawaii," Act of April 30, 1900; 31 Sts. at L. 141, c. 339).

On March 3rd, 1905, five years after the organization of the Territory of Hawaii, Congress provided for writs of error and appeals to the Supreme Court of the United States from the final judgments of the Supreme Court of Hawaii, where the amount involved exceeded $5000, irrespective of any federal question, (33 Sts. at L. c. 1465, s 3; § 246 of the Judicial Code) the material portion of the section reading as follows:

> "Writs of error and appeals from the final judgments and decrees of the Supreme Court of the Territory of Hawaii may be taken and prosecuted to the Supreme Court of the United States, * * * in all cases wherein the amount involved, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars."

(§ 1223 of the United States Compiled Statutes 1913, Judicial Code § 246.)

On January 28, 1915, while the present case was pending a decision by the Supreme Court of Hawaii, Congress amended § 246 of the Judicial Code by striking out the portion just quoted and providing in its stead the following:

> "Writs of error and appeals from the final judgments and decrees of the supreme courts of the Territory of Hawaii and of Porto Rico, wherein the amount involved, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the value of $5,000, may be taken and prosecuted in the circuit courts of appeals."

(Act of January 28, 1915, 38 Stat. at L. 804, c. 22.)

It will be noted that practically the only change in Section 246 was the substitution of the words "circuit courts of appeals" in the place of "Supreme Court of the United States," and placing Porto Rico in the same class with Hawaii.

Congress having provided by the Act of January 28, 1915, that certain classes of cases might be taken to the Circuit Court of Appeals from the Supreme Court of Hawaii for review, the question as to whether that court is the court of last resort for such cases can be answered only by an examination of the statutes defining and limiting the jurisdiction of the Circuit Court of Appeals and defining the appellate jurisdiction of the Supreme Court of the United States.

The Circuit Court of Appeals, at the time it was given appellate jurisdiction over Hawaiian cases, was not a court of final resort except in certain specified classes of cases. Section 2 of the Judiciary Act of March 3, 1891, c. 517, 26 Sts. 826, which became Section 117 of the Judicial Code (§ 1108 of the U. S. Comp. Stat. 1913) provided that in each circuit there should be a circuit court of appeals, "with appellate jurisdiction as hereinafter limited and established."

Section 6 of the Judiciary Act of 1891 (Section 128 of the Judicial Code, § 1120 U. S. Comp. Stat. 1913) defined precisely the classes of cases over which the Circuit Courts of Appeals should exercise appellate jurisdiction and specified the classes of cases in which the judgments of that Court should be final, viz., (1) In all cases in which the jurisdiction was dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; (2) Also in all cases arising under the patent laws; (3) Under the revenue laws;

(4) Under the criminal laws; (5) in admiralty cases; and by a later amendment, (6) Under the copyright laws.

By this enumeration of the classes of cases in which the judgments and decrees of the Courts of Appeals are *made final* any doubt as to whether the decision of the Circuit Court of Appeals in the present case can be considered as *made final* is at once laid at rest, under familiar rules of construction. Unquestionably therefore, the judgment of the Circuit Court of Appeals now before this Honorable Court for reveiw was *not made final* by any provision in the Judicial Code.

This leaves for consideration the question of whether the Plaintiff in Error in the present case has the *right* to carry the judgment of the Circuit Court of Appeals to the Supreme Court of the United States for review.

The only provision made by the Judicial Code for review by this Honorable Court of the judgments and decrees of the Circuit Courts of Appeals are Sections 239, 240 and 241 of the Judicial Code. These sections were, in substance, originally part of Section 6 of the Judiciary Act of March 3, 1891 (26 Stat. at L. 828). Section 6 of the Judiciary Act contained also the provisions above referred to respecting the appellate jurisdiction of the Circuit Courts of Appeals and the enumeration of cases in which its decisions should be final. This section is set out in full in the brief of Defendant in Error on the motion to dismiss, pages 3, 4 and 5.

Section 241 of the Judicial Code, under which plaintiff in error claims this Court has jurisdiction, reads as follows:

> "In any case in which the judgment or decree of the circuit court of appeals is not made final by the provisions of this Title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs."

(§ 1218 of the United States Compiled Statutes 1913, Judicial Code § 241.)

In brief, the mode in which cases may be carried to the United States Supreme Court and the classes of cases thus reviewable are as follows: first, the certification of questions by the Circuit Court of Appeals to the Supreme Court for instructions; second, in cases *made final by the provisions of the title* the Supreme Court is given the right to require by certiorari or otherwise that any such case should be certified to it for review and determination; and third, in any case in which the judgment or decree of the Circuit Court of Appeals *is not made final* by the provisions of this title, the losing party is given the right by appeal or writ of error to carry the judgment to the Supreme Court of the United States for review and determination.

From these provisions of the code it is clear that it was the intent of Congress that the Supreme Court should have appellate jurisdiction over all cases brought before the Circuit Court of Appeals—in some instances such right of review being optional with the Supreme Court and in others optional with the party aggrieved by the decision of the Circuit Court of Appeals. It is likewise clear from Section 241 of the Judicial Code that in cases such as the present, where the judgment of the Circuit Court of Appeals is not made final by any provision in the Judicial Code, the party aggrieved has an unqualified right to a review of such judgment by the Supreme Court.

It happens that the present is the first Hawaiian case to be carried from the Circuit Court of Appeals to the Supreme Court, and consequently there is no absolute precedent. However, as above noted, the substance of Section 241 of the Judicial Code has been in force since 1891, and during this period there has been in force a provision by which the Cir-

cuit Courts of Appeals are given appellate jurisdiction over decisions of the Territorial Supreme Courts; Sec. 15 of the Act of March 3, 1891, 26 Stat. at L. 830.

The Supreme Court of the United States has had occasion to consider not only this appellate jurisdiction of the Courts of Appeal over the decisions of Territorial Supreme Courts, but its own appellate jurisdiction over decisions of the Circuit Courts of Appeals in such territorial cases. In the case of *Shute* vs. *Keyser*, 149 U. S. 649, 37 Law Ed. 884 and in the case of *Aztec Mining Company* vs. *Ripley*, 151 U. S. 79, 38 Law Ed. 80, these points were covered, and while the decisions may not be of much assistance in determining the question now before the Court, yet the latter case is important in that the phrase "*in all cases not hereinbefore in this section made final* there shall be of right an appeal * * *" was applied as we contend the similar phrase in Section 241 of the Judicial Code should be, the language of the Court being as follows:

> "The last paragraph of the section provides that 'In all cases not hereinbefore in this section made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States, when the matter in controversy shall exceed one thousand dollars besides costs'; *and as this case was not made final by that section, a writ of error would lie* were it not that under Section 15 that Court had no jurisdiction to review the judgment." (The italics are ours.)

In view of the fact that the Circuit Courts of Appeals were by the Judiciary Act of 1891, given appellate jurisdiction over judgments and decrees of the Supreme Courts of the Territories and the Indian Territory (26 Stat. at L. §§ 829, 830), there is no force in the argument that Section 241 of the Judicial Code refers only to cases originat-

ing in the District and Circuit Courts of the United States.

Decisions of the Hawaiian Supreme Court were not reviewable by the Circuit Court of Appeals because Hawaii was not an organized territory at the time of the Judiciary Act, and the provision in the Organic Act of the Territory of Hawaii respecting review of Hawaiian decisions was inconsistent with the view that the Circuit Court of Appeals had appellate jurisdiction over such cases, Section 86 of this Act restricting appeals to cases in which appeals are allowable to the United States courts from the courts of the several states; see *Wilder Steamship Company* vs. *Hind*, 108 Fed. Rep. 113, *affirmed* 183 U. S. 552.

Consequently, in view of the provision made by Section 241 of the Judicial Code, we respectfully submit that the plaintiff in error has *of right a writ of error* and therefore this Honorable Court has jurisdiction to review the judgment in question.

THE JOURNALS OF CONGRESS DO NOT SHOW THAT IT WAS THE INTENTION OF CONGRESS TO MAKE THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS FINAL.

While it is undoubtedly true that one of the primary objects of the Judiciary Act of 1891 was to relieve the Supreme Court of the overburden of cases and controversies and to transfer, in accomplishment of that object, a large part of its appellate jurisdiction to the Circuit Courts of Appeals, yet this intent did not prevent Congress from providing in the Act of March 3, 1891, in the case of territories, not only for appeals and writs of errors in certain specified cases from the decisions of the Circuit Courts of Appeals, but also for direct appeals and writs of error from the Territorial Supreme Courts to the Supreme Court of the United States. This appears clearly from the two cases above re-

ferred to: *Aztec Mining Company* vs. *Ripley*, and *Shute* vs. Keyser, as well as from an examination of the Statutory provision in question.

THE DISCREPANCY IN JURISDICTIONAL AMOUNTS BETWEEN SECTIONS 241 AND 246 IS NOT SIGNIFICANT, BUT AT MOST EVIDENCE OF HASTE IN THE PASSAGE OF THE ACT OF JANUARY 28, 1915.

While it is true that under Section 246 of the Judicial Code as amended January 28, 1915, $5000 is the jurisdictional amount for cases to be carried from the Supreme Court of the Territory of Hawaii to the Circuit Court of Appeals, and the jurisdictional amount fixed by Section 241 of the Judicial Code for carrying cases from the Circuit Court of Appeals to the Supreme Court of the United States is only $1000, yet this fact of itself does not aid the argument that Congress did not intend that Section 241 should apply to cases brought to the Circuit Court of Appeals from the Supreme Court of the Territory of Hawaii. The reason for this disparity in jurisdictional amounts is not difficult to find when reference is made to the debates in Congress resulting in the passage of the Act in its final amended form.

The act of January 28, 1915, (H. R. 19076) in the form it came from the House to the Senate was correctly summarized by the Senate Judiciary Committee in its report, viz.,

> "Relieving the Supreme Court of the United States from the necessity of reviewing such cases from the Supreme Courts of Porto Rico and Hawaii as involve no federal question, but depend entirely on the local or general law, etc."

(Congressional Record, Senate, December 21, 1914, page 435.)

Had the bill passed in its original form neither the Circuit Court of Appeals nor this Court would have had jurisdiction over this or any similar Hawaiian case.

When the bill came up for third reading in the Senate, three weeks after the Judiciary Committee's Report above quoted from, certain amendments not material to the present case—namely, relating to placing Porto Rico in a Circuit, making the decisions of the Courts of Appeals in trade mark cases final, etc., were offered by the Judiciary Committee. After these proposed amendments had been debated, Senator Southerland stated that he had that day received protests from the Bar of Hawaii against the provision in the bill which sought to take away from the Supreme Court of the United States appellate jurisdiction over Hawaiian Supreme Court cases involving $5000 or over. Rather than delay the passage of the bill until the formal opposition of the Bar Association of Hawaii could be received, he suggested a compromise measure and hurriedly writing out his proposed amendment (so hurriedly written that to avoid mistake he himself read it), he proposed as an amendment that the following be added at the end of Section 2 of the bill:

> "Writs of error and appeals from the final judgments and decrees of the Supreme Courts of Hawaii and Porto Rico, wherein the amount involved, exclusive of costs, to be ascertained by the oath of either party or other competent witnesses, exceeds the value of $5000 may be taken and prosecuted in the Circuit Court of Appeals."

With no reference back to Committee, no analysis of other related provisions in the code, and with practically

no debate, this amendment was accepted and the bill in its amended form passed its final reading—all within perhaps not more than half an hour (Congressional Record, Senate, January 14, 1915, pp. 1542-1546). The House having concurred in the Senate's amendments, likewise without debate, the bill went to the President, by whom it was approved January 28, 1915.

In view of the haste with which the bill was considered after the amendment in question was offered, it is not strange that the discrepancy in jurisdictional amounts should have occurred. It is evident that the amendment in question was based wholly on the language of Section 246, for except for the transposition of one pharse, the substitution of the Court of Appeals for the Supreme Court and the addition of Porto Rico the wording is the same.

Even admitting that the actual intent of Congress in passing the bill in its final amended form was to relieve this Court of part of its burden, by substituting the Circuit Court of Appeals as the appellate court for Hawaii, it failed to fully accomplish this purpose. Possibly had there been no necessity for haste the amendment proposed by Mr. Southerland would have been referred back to the Judiciary Committee and they undoubtedly would have seen that to relieve this Court entirely from Hawaiian cases it was necessary to add to the amendment some phrase indicative of that intent, such as "*and the decisions of the Circuit Courts of Appeals in such cases shall be final.*"

In its present form the act accomplishes only part of the purpose, for while the decisions of the Circuit Court of Appeals will end many controversies, there doubtless will be cases, such as the present one, where the parties will deem themselves wronged by the decision of the Court of Appeals and seek redress from this Court. To this extent,

therefore, the Act failed to fully accomplish what possibly was the purpose of Congress.

Where the language of a statute is plain and unambiguous and can have but one meaning as in the present instance, the provisions must be given their legal effect even though in so doing possibly the actual but unexpressed purpose of Congress is not carried out.

However, the fact that by section 4 of the Act of January 28, 1915, the decisions of the Circuit Court of Appeals were expressly made final in bankruptcy cases is strong evidence that Congress knew that without such declaration, decisions by the Circuit Court of Appeals, in such cases, would not be final — and therefore, evidence of the intent that decisions of that Court on cases from Hawaii, provided for in the same Act, were not intended to be final.

We respectfully submit that this Court has jurisdiction of the present case and therefore the motion to dismiss should be denied with costs.

Respectfully submitted,

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